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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 696

THE FIRST NATIONAL BANK OF CHICAGO, Trustee under the Last Will and Testament of Otto Young, Deceased, and in its individual capacity, GWENDOLYN YOUNG HEYWORTH KOCH, MARIE JULIA YOUNG KAUFMAN PRATT, OTTO YOUNG KAUFMAN, OTTILIE WICKES COCHRAN, BETTY WICKES SAGE, NANCY WICKES SHAW, WALTER F. WICKES, JR., CATHERINE YOUNG WICKES, and JOHN WILLIAM YOUNG MARTIN,

Petitioners,

vs.

MARGARET de KORWIN, individually, and as Executrix of the Will of Joseph Maria de Korwin, Deceased,

Respondents.

REPLY OF HOWARD D. MOSES, GUARDIAN AD LITEM, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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REPLY OF HOWARD D. MOSES, GUARDIAN AD LITEM, TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Howard D. Moses, Guardian ad Litem, respectfully submits this as his reply to the petition for writ of certiorari to review the decision and order of the United States Circuit Court of Appeals for the Seventh Circuit in the

above entitled cause reversing the judgment of the District Court for the Northern District of Illinois, Eastern Division, which had dismissed the above entitled cause of action.

STATEMENT.

The statement of the petitioner is incomplete and misleading. It would, therefore, be difficult for this Court to pass upon the application of the law involved without amplifying the statement contained in the original petition.

The statement of the petitioner conveys the impression that the jurisdiction of the District Court is invoked in this cause merely upon the ground of diversity of citizenship, when, in fact, the complaint alleges additional grounds of jurisdiction, namely, a class action and a Federal question involved. The statement of the petitioner also neglects to comment upon the status of the pleadings in that the Guardian ad Litem filed a cross-claim and counter-claim to the complaint in which a Federal question is alleged and which counter-claim and cross-claim, independent of the complaint, would invoke the jurisdiction of the Federal Court.

Upon filing the motion to strike the complaint on jurisdictional grounds, an order was entered in the District Court continuing the time for filing an answer to the counter-claim and cross-claim until twenty days after the determination of the motion to strike the complaint (Rec. 117). No answer or motion to strike the counter-claim or cross-claim was filed by any litigant, and yet after ruling on the motion to strike the complaint, the District Court dismissed the cause of action and with it the cross-claim and counter-claim of the Guardian ad Litem.

The Petition for Certiorari raises the jurisdictional question of diversity of citizenship, one of the jurisdictional allegations of the complaint. It is not a jurisdictional ground in the cross-claim and counter-claim. Since the attorney for the plaintiff argued the question of re-alignment of the parties and diversity of citizenship in the Circuit Court of Appeals, argument upon the question of diversity of citizenship will be dispensed with herein since it is expected it will be adequately argued in the reply of the attorney for the plaintiff.

Jurisdiction of This Court.

This Court is without jurisdiction to issue a writ of certiorari to the United States Circuit Court of Appeals for the Seventh District in this matter under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. 347(a) in that the judgment of the United States Circuit Court of Appeals for the Seventh District reversing and remanding the cause to the District Court is not a final judgment or decree, and the reasons given by the Circuit Court of Appeals for their decision is not in conflict with any local law of Illinois or decisions of other Circuit Courts of Appeal or any decisions of this Court in any respect.

PROPOSITIONS OF LAW RELIED UPON.

I.

The judgment of the circuit court of appeals reversing the trial court and remanding the cause to the trial court for further proceedings is not a final judgment or decree upon which this court may issue a writ of certiorari.

Federal Code Title 28, U.S.C.A. 347(a).

Slaker, Administrator, v. *O'Connor,* 49 S. Ct. 158, 278 U. S. 188, 73 L. Ed. 258

Martinez v. *International Banking Corporation,* 220 U. S. 214, 223

Drake v. *Kochersperger,* 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 942

Clark v. *Kansas City,* 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. Rep. 207

Chicago & Northwestern Ry. Co. v. *Osborne; Chicago & Northwestern Ry. Co.* v. *Junod,* 146 U. S. 354, 355.

Kingman & Company v. *Western Manufacturing Company,* 170 U. S. 675, 42 L. Ed. 1192.

Re Lau Ow Bew, 141 U. S. 583

The Conqueror, 166 U S. 1100.

United States v. *The Three Friends,* 166 U. S. 1.

II.

The judgment of the circuit court of appeals was proper in that the order dismissing the cause of action was erroneous if only the complaint was insufficient when a cross-claim and a counter-claim are on file with sufficient averments of jurisdiction.

Jefferson v. *Gypsy Oil Co.*, 27 Fed. (2d), 304, 305, 306.
National Banking Act, 12 U. S. C. 34 (a).

III.

The judgment of the circuit court of appeals was proper in that the trial court in considering the sufficiency of the complaint without consideration of the sufficiency of the cross-claim or counter-claim could only enter an order with respect to the complaint, and it was error to dismiss the entire cause of action and with it the cross-claim and counter-claim.

Merchants Heat & Light Co. v. *James B. Clow & Sons*, 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488.
Ginsburg v. *Pacific Mutual Life Insurance Company of California*, 69 Fed. (2d) 97, 98.
Metropolitan Holding Co. v. *Snyder*, 70 Fed. (2d) 263, 268.
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Johnson v. *Umstead*, et al, (C. C. A.) 64 Fed. (2d) 316.

ARGUMENT.

I.

The judgment of the circuit court of appeals reversing the trial court and remanding the cause to the trial court for further proceedings is not a final judgment or decree upon which this court may issue a writ of certiorari.

The provisions of the Federal Code under Title 28, U.S.C.A. 347(a) relied upon by the petitioner providing for certiorari either before or after judgment or decree of the lower court gives the Supreme Court a broad discretion of its jurisdiction to issue a writ of certiorari at any stage of the appeal in the Circuit Court of Appeals. The Supreme Court, however, has, by its various decisions, consistently restricted the right to petition by certiorari before judgment to cases involving public welfare, statutory appeals from governmental agencies, and certification by the Circuit Court of Appeals, itself, regarding certain phases of a case before it for decision. Even in those few cases, the Supreme Court has required that the petition for certiorari be filed before judgment in the Circuit Court of Appeals rather than after judgment. If the petition for certiorari is presented after judgment, it must be a final judgment or decree so that the Supreme Court would not be called upon to decide the case piecemeal. The judgment of the Circuit Court of Appeals in this cause reversing the trial court and remanding the cause for further proceedings in the District Court is not a final

judgment or decree upon which the Supreme Court will issue a writ of certiorari.

Slaker, Administrator, v. *O'Connor,* 49 S. Ct. 158, 278, U. S. 188, 73 Law. Ed. 258, which was decided after the Act of February 13, 1925, amending Section 240(a) of the Judicial Code, is a case in which the Circuit Court of Appeals reversed the action of the trial court and remanded the cause for further proceedings, which was exactly the judgment in this case. There this court said:

> "Manifestly, the decree below is not final. Under the Act of February 13, 1925 (43 Stat. at L. 939, Chap. 229, U.S.C. Title 28, Par. 347), Par. 240(b) appeals to this court from Circuit Courts of Appeal lie only from final judgments or decrees (*Martinez* v. *International Banking Corporation,* 220, U S. 214, 223, 55 L. Ed. 438, 443, 31 Sup. Ct. Rep. 408) * * *"

In the Martinez case, the Supreme Court said:

> "It follows that although the Appellate Court fixed the rights and liabilities of the parties, it in effect referred a question in the case to the subordinate court for further judicial action; hence its judgment was not final for the purpose of an appeal on writ of error. *Drake* v. *Kochersperger,* 170 U. S. 303, 42 L. Ed. 1046, 18 Sup. Ct. Rep. 942; *Clark* v. *Kansas City,* 172 U. S. 334, 43 L. Ed. 467, 19 Sup. Ct. Rep. 207. Until, therefore, the trial court by its judgment ascertains and fixes the actual indebtedness due the plaintiff, and complies with the other directions contained in the mandate, it cannot be said that a final decree has been entered in the cause. * * * But the foundation upon which rests the doctrine which, as a general rule, limits the appellate jurisdiction of this court to final judgments, is that cases should not be brought here by piecemeal through the medium of successive appeals." (*Martinez* v. *International Banking Corporation,* 220

U. S. 214, 223, 55 L. Ed. 438, 443, 31 Sup. Ct. Rep. 408).

One of the leading cases which has been consistently followed by the Supreme Court of the United States is the case of *The Chicago & Northwestern Railway Company* v. *John Osborne* consolidated with *The Chicago & Northwestern Railway Company* v. *Junod,* 146 U. S. 354, 355. In that case it was held that a case cannot be removed by a writ of certiorari from the Circuit Court of Appeals to the Supreme Court except in cases where a judgment of that court was a final one. In this case the Circuit Court of Appeals reversed the judgment of the trial court and remanded the case for proceedings consistent with the opinion, and the judgment of the Circuit Court of Appeals was not final and could not be removed to the Supreme Court by writ of certiorari. In no instance to our knowledge has the Supreme Court deviated from this rule.

In *Kingman & Company* v. *Western Manufacturing Company,* 170 U. S. 675, 42 Law Ed. 1192, the court says:

> "Certiorari is the proper remedy to review a decision of the Circuit Court of Appeals dismissing, for want of jurisdiction, a case within the class of cases in which the judgment of that court is made final."

In no case has the Supreme Court issued a writ of certiorari where the judgment of the Circuit Court of Appeals was not final except in those cases where the Circuit Court of Appeals certified a question to the Supreme Court *before* judgment of the Circuit Court of Appeals. This has only occurred when the Supreme Court is considering a case involving the same points and could decide the cases together, or where the question is of great public interest and of sufficient gravity and importance to concern the welfare of the nation, or where the matter is one of international concern, including appeals from agencies of the govern-

ment such as the Interstate Commerce Commission, the Federal Trade Commission and other agencies where statutory provision for appeal to the Supreme Court is given. *Re Lau Ow Bew,* 141 U. S. 583; *The Conqueror,* 166 U. S. 110; *United States* v. *The Three Friends,* 166 U. S. 1.

II.

The judgment of the circuit court of appeals was proper in that the order dismissing the cause of action was erroneous if only the complaint was insufficient when a cross-claim and a counter-claim are on file with sufficient averments of jurisdiction.

The counter-claim of Howard D. Moses, Guardian ad Litem for the Infant and Incompetent or Insane Defendants, alleges, (Rec. 100) as follows:

> "That a vacancy presently exists in the trust created by the Last Will and Testament of Otto Young, deceased, and has existed since the 11th day of February, 1929, when the Trustee, named in said Testamentary Trust, consolidated with the Union Bank of Chicago and that the defendant, First National Bank of Chicago, a national banking association, has since July 17, 1933, acted as Trustee under the Testamentary Trust of Otto Young, deceased, de son tort and that as a result thereof the said defendant, First National Bank of Chicago, has acted without authority and thereby assumed all of the risks attendant upon its management and should be ordered by this court to account for all losses resulting therefrom without benefit of any profits and without benefit and compensation for their services, commissions, fees paid to themselves, their agents, attorneys and employees out of the assets of said trust; that defendant, First National Bank of Chicago, since the consolidation of the First Union Trust & Savings Bank with it, is not a

continuation of the same legal entity as the First Union Trust & Savings Bank or its predecessor, the First Trust & Savings Bank of Chicago, Trustee, named in the last Will and Testament of Otto Young, deceased; that said First Union Trust & Savings Bank after July 17, 1933, ceased to exist and the First National Bank of Chicago, which is a different corporation established under the laws of a different sovereignty, possessed of different powers, owing allegiance to a different jurisdiction, governed by different laws and subject to different governmental supervision, continued as the same legal entity as it had prior to said alleged consolidation and could not by any remote construction of the law and the facts be construed as a continuance of the same legal entity appointed Trustee under the last Will and Testament of Otto Young, deceased; THAT THE SAID LAST WILL AND TESTAMENT OF OTTO YOUNG, DECEASED, PROVIDES FOR A SUCCESSOR IN TRUST OR A NEW TRUSTEE TO BE APPOINTED BY A COURT OF COMPETENT JURISDICTION AND THAT THE PROVISIONS OF THE NATIONAL BANKING ACT IN FORCE AND AS AMENDED ON JULY 17, 1933, COULD NOT DEPRIVE THE COURT OF ITS JUDICIAL FUNCTION AND THAT ANY ATTEMPT OF CONGRESS TO DO SO IS AN INFRINGEMENT BY THE LEGISLATIVE BRANCH OF GOVERNMENT UPON THE RIGHT OF THE JUDICIARY: that the right of the Trustee named in the last Will and Testament of Otto Young, deceased, by agreement to consolidate with any other bank or trust company enables the said Trustee to designate its successor when the Will of Otto Young specifically provides that the successor in trust should be appointed by a court of competent juridiction and that the agreements of the Trustee to designate the successor in trust are beyond the rights, powers and duties given it under the said last Will and Testament of Otto Young, deceased."

Also the cross-claim of Howard D. Moses, as Guardian ad Litem for the Infant and Incompetent or Insane Defendants, sets forth the same averments of the Federal question to be decided by the court, (Rec. p. 110).

The provisions of the National Banking Act which requires the construction of the court are in 12 U. S. C. 34 (a) and reads in part as follows:

> "* * * such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such contituent institution at the time of such consolidation."

The Federal question involved is strongly and substantially pleaded in the above averments and calls for an interpretation of the National Banking Act to determine whether or not that part of the Act, as amended, is constitutional which permits national banks to take over fiduciary trusts which are under the jurisdiction of a court without allowing the court its right to appoint a successor. In other words, should a Trustee have the right to appoint its successor by consolidation with its successor and thereby deprive the court of the right to appoint or approve such successor trustee, contrary to the provisions of the trust created by the Will?

In the case of *Jefferson* v. *Gypsy Oil Co., et al,* 27 Fed. (2d) 304, the court holds that if the action involves and

its determination depends upon the construction of certain laws of the United States, then Federal jurisdiction follows. It points out that the dispute must involve a substantial question as to the construction of Federal Statutes and not a colorless or frivolous one, and it is the contention of this respondent to the petition for certiorari that the allegations of the cross-claim and counter-claim clearly involve a substantial question of construction of the Federal Banking Act, as amended.

III.

The judgment of the circuit court of appeals was proper in that the trial court in considering the sufficiency of the complaint without consideration of the sufficiency of the cross-claim or counter-claim could only enter an order with respect to the complaint, and it was error to dismiss the entire cause of action and with it the cross-claim and counter-claim.

In the case of the *Metropolitan Holding Co.* v. *Snyder*, 79 Fed. (2d), 263, 268, the court says:

> "The court is required to determine from the evidence whether the Decree was right or whether some other decree should be entered this being in the nature of a trial de novo. *Johnson* v. *Umsted, et al,* (CCA) 64 Fed. (2d), 316."

It is apparent from the record that the District Court gave no consideration to the averments of the cross-claim or counter-claim and that if justified in dismissing the complaint, the order entered by the trial court should be remanded with directions to limit the order to the complaint and not to the entire cause of action, including the cross-claim and counter-claim filed by the Guardian ad Litem.

In the case of *Ginsburg* v. *Pacific Mutual Life Insurance Co. of California,* 69 Fed. (2d), 97, at page 98, the court says:

> "We need not consider the jurisdiction controversy as to the amount the appellant sues to recover because the counter-claim interposed establishes the jurisdiction of the District Court. *Merchants' Heat & Light Co.* v. *James B. Clow & Sons,* 204 U. S. 286, 27 S. Ct. 285, 51 L. Ed. 488."

This decision is also cited by the Second Circuit in *Goldstone Co.* v. *Payne,* 94 Fed. (2d), 855, 857.

It is clear from these decisions that where the counter-claim or cross-claim makes sufficient averments of a Federal question involved the filing of such counter-claim can give the court jurisdiction of a case whether the original complaint has sufficient jurisdictional averments or not.

The trial court could not properly dismiss the entire cause of action and with it the cross-claim and counter-claim to which no answer or motion to strike was filed and were not at issue.

The order of the District Court dismissing the entire cause of action includes in the order of dismissal the cross-claim and counter-claim to which no answer had been filed to either and no motion to strike either cross-claim or counter-claim had been filed and, therefore, neither the cross-claim nor the counter-claim were at issue and no hearing was had on the sufficiency or insufficiency of the cross-claim or counter-claim and no mention of the sufficiency or insufficiency of the cross-claim or counter-claim was incorporated in the order dismissing the cause of action.

Under Rule 8 (d) of the Rules of Federal Procedure,

averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. In the case of *United States* v. *Hole, et al,* 38 Fed. Supp., on page 604, the court says:

> " * * * A reply under the Rules of Civil Procedure is required if the answer contains a counter-claim, denominated as such."

In this case there were no pleadings filed by any of the parties putting the counter-claim and cross-claim in issue and, therefore, the order dismissing the cause should have been limited to the complaint and not include cross-claim or counter-claim as it did in the order dismissing the entire cause of action.

CONCLUSION

This court may, of course, in the exercise of its discretion under the broad language of Section 240(a) of the Judicial Code as amended, issue the writ of certiorari which, however, would be unique and contradictory to all precedent when the judgment of the Circuit Court of Appeals was not final nor even an interlocutory order, but reversed and remanded the cause to the trial court for further proceedings.

Furthermore, the jurisdictional question of diversity of citizenship is not the only ground upon which jurisdiction is vested in the Federal Court, but there are also averments in the complaint and in the cross-claim and counter-claim alleging additional jurisdictional grounds, namely a Federal question is involved and the complaint alleges this to be a class suit.

Wherefore, it is respectfully submitted that the writ of certiorari to review the decision herein of the Circuit Court of Appeals for the Seventh District be denied.

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